

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals))	
with Hearing and Speech Disabilities)	

**Supplemental Comments of the
National Association of the Deaf**

The National Association of the Deaf (“NAD”), hereby files these Supplemental Comments in support of the *Petition for Declaratory Ruling and Complaint Concerning the Provision of Video Relay Service by Sorenson Communications, Inc.*¹ (the “Petition for Declaratory Ruling”) filed by Hands On Video Relay Services, Inc., Snap Telecommunications, Inc., Communications Center for the Deaf and Hard of Hearing, CSDVRS, LLC, and GoAmerica, Inc. (collectively, “Petitioners”). The Petitioners request the Commission to find that the use of a non-compete provision in employment contracts for Video Relay Service (“VRS”) interpreters, such as in the “Employment Agreement” of Sorenson Communications, Inc. (“Sorenson”),² is void as against public policy.

¹ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Petition for Declaratory Ruling and Complaint Concerning the Provision of Video Relay Service by Sorenson Communications, Inc., CGB Docket No. 03-123 (filed May 18, 2007).

² *Id.*, at 2 and 46 (Exhibit 3, “Employment Agreement,” Section 4.1).

The NAD supports and is a party to Comments filed by the “Consumer Groups,”³ which Comments are incorporated herein by reference. The NAD offers these Supplemental Comments to address more specifically the nature and impact of non-compete provisions in employment contracts for VRS interpreters and the non-compete provision at issue.

The NAD advocates for increasing the number and availability of qualified interpreters to meet existing and future demand, by using all effective means of providing interpreter services (in-person and by video), and in all areas, including education, employment, legal, medical, mental health care, and telecommunications. Further, the NAD supports a free, open, and competitive marketplace for the existing supply of and diverse demand for qualified interpreter services, including VRS, to ensure that these services are available to the extent possible and in the most efficient manner.

1. The Non-Compete Provision at Issue

Sorenson’s “Employment Agreement” provides as follows:

4. PROTECTIVE COVENANTS. Employer is in a competitive industry that provides interpretive video relay services. . . . Employee has been, and in the future, will continue to be given access to a substantial amount of Confidential Information, as described below. In order to protect the *Confidential Information* of the Company and the *goodwill* and *customer relationships* with which the Employee has been entrusted with by the Employer, Employee agrees as follows:

³ Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Association of Later-Deafened Adults, Inc. (“ALDA”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”) and Hearing Loss Association of America (“HLAA”) (collectively, the “Consumer Groups”).

4.1 Scope of Covenants. *Employee hereby agrees that during the time Employee is employed by Employer and for a period of one (1) year from the date Employee's employment is terminated, Employee will not participate in, work or consult for, whether as an owner, independent contractor, or consultant, or be employed by any other video relay service company or any other provider of video relay service or any of its sub contractor/agents working within the markets where the Employee performs services for the Employer. However, the Employee can continue to work and provide interpreting services with community based agencies. Employer and Employee acknowledge and agree that the geographic scope of this covenant is any state in the United States, or in any substantially similar political subdivision of any other country, that Employee helps Employer do business in while Employee is employed with Employer, for the time period set forth herein, in recognition of the worldwide market for video relay services served by Employer.*⁴

2. The Commission Should Declare the Non-Compete Provision at Issue Void as Against Public Policy Because It Is Overbroad, Unreasonable, and Harmful to Qualified ASL Interpreters, Consumers, a Competitive Marketplace, and the Commission

NAD recognizes the need to protect “confidential information,” “goodwill,” and “customer relationships.” Like Petitioners, NAD does not take issue with the provisions of Sorenson’s “Employment Agreement” that serve to protect those interests.⁵ The NAD also agrees with Petitioners that the non-compete provision at issue is not justified by any interest Sorenson may have with respect to preserving

⁴ *Petition for Declaratory Ruling* at 45-46 (Exhibit 3, “Employment Agreement”) (emphasis added).

⁵ *See, e.g.*, Section 4.2 (No Solicitation of Officers, Directors, Employees, Independent Contractors), Section 4.3 (No Solicitation of Customers), Section 6 (Confidential Information), Section 7 (Intellectual Property), and Section 8 (Representations and Warranties of Employee). *Petition for Declaratory Ruling* at 46-52 (Exhibit 3, “Employment Agreement”). *See also* *Petition for Declaratory Ruling* at 16-21.

its investment in its VRS interpreters.⁶ Sorenson identifies the following qualifications for its VRS interpreter positions in the United States:

- Ability to effectively communicate in American Sign Language (ASL)
- Preferred 5-10 years working experience as a certified sign language interpreter in a variety of settings
- NAD level IV/V, or RID :CI, CT, CI/CT, CSC or
- Hold a state interpreter certificate at the Intermediate or Master Certificate skill levels or
- Have the professional interpreting experience to become a Sorenson VRS interpreter (this is determined by management)
- Excellent voicing skills and a good understanding of deaf culture
- Experience with video interpreting preferred⁷

Indeed, an individual must have extensive knowledge, skills, abilities, and experience that can only be obtained by that individual over the course of many years, *before* that individual can be a qualified applicant for a position as a VRS interpreter. Any specialized or unique training to be a VRS interpreter, for *any* VRS provider, is comparatively minor.

Further, NAD believes that non-compete provisions, such as the provision in Sorenson's "Employment Agreement," that restrict future employment, professional opportunities, and choices for qualified ASL interpreters, in a market where demand has consistently and increasingly outpaced supply, should be void as against public policy.⁸ The NAD believes that such non-compete provisions are

⁶ See *Petition for Declaratory Ruling* at 21-23.

⁷ Sorenson Jobs: Position: VRS Interpreter, US, viewed September 3, 2007 at <http://www.sorensonvrs.com/company/jobs.php>.

⁸ See also, Comment filed by Sally Fortuna, Docket No. 03-123, August 14, 2007:

I am a sign language interpreter working as a CA with Sorenson [Communications]. I believe Sorenson should be required to remove the do-not-compete restriction from the employment

overbroad and unreasonable, and harmful to qualified ASL interpreters, consumers, a competitive marketplace, and the ability of the Commission to ensure that Telecommunications Relay Services (“TRS”), including VRS, is “available, to the extent possible and in the most efficient manner.”⁹

Indeed, the non-compete provision at issue is incredibly broad. For one year after a VRS interpreter’s employment is terminated, he or she may not “participate in, work or consult for, whether as an owner, independent contractor, or consultant, or be employed by any other video relay service company or any other provider of video relay service or any of its sub contractor/agents working within the markets where the Employee performs services for the Employer.”¹⁰ This non-compete provision prohibits former VRS interpreters, irrespective of the length of

contract. As a sign language interpreter who wishes to work in the video relay arena, I feel it is a highly unfair and restrictive practice to require interpreters who wish to stop working for Sorenson Communication to be penalized by barring them from work with another company for a year. Video Relay interpreting is a rapidly growing service. At this point there are not enough interpreters to fill the need. To bar an interpreter from working as a CA for a full year after leaving employment with Sorenson, does not serve the public who relies on video relay nor does it serve the interpreters who work hard to provide this service.

⁹ 47 U.S.C. § 225(b). Section 225 of the Telecommunications Act of 1934 imposes a mandate on the Commission to ensure that TRS is available to individuals who are deaf or hard of hearing or who have a speech disability. Specifically, subsection 225(b)(1) (emphasis added) states:

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, *the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner*, to hearing-impaired and speech-impaired individuals in the United States.

Any practice of a TRS provider that impedes this mandate comes within the scope of the Commission’s jurisdiction, and that authority encompasses private employment contracts that impede the development of a competitive TRS market.

¹⁰ *Petition for Declaratory Ruling* at 2 and 46 (Exhibit 3, “Employment Agreement,” Section 4.1).

employment as a VRS interpreter (i.e., one day, three months, or five years) and regardless of the reason for termination (i.e., laid off as part of a reduction in force, or resigned for personal reasons such as relocation), from taking *any* position with another VRS provider or another VRS provider's subcontractors or agents for one year.

The non-compete provision ostensibly permits, but in fact limits former VRS interpreters "to work and provide interpreting services with community based agencies."¹¹ The provision further prevents a former VRS interpreter from providing community interpreting for a competing VRS provider that also provides community interpreting services, such as Hands On Sign Language Services, or for a community based agency that also provides VRS interpreter services for a competing VRS provider.¹² Qualified interpreters have a variety of reasons why they choose to work in one type of environment or another, and many find that VRS

¹¹ *Id.*

¹² *See also*, Comment filed by Nathan Ryan, Docket No. 03-123, August 21, 2007:

Dear FCC,

I am a sign language interpreter and employee of Sorenson VRS. I have worked for Sorenson for one-and-a-half years. I am concerned that the non-compete agreement I was made to sign is unreasonably restrictive. . . . Traditionally, interpreters get a large percentage of their work [t]hrough various independent interpreting agencies. More and more of these agencies are setting up video relay services, even if only three booths in their main headquarters. Under Sorenson's restrictions, these entities would be labeled "Video Relay providers" and interpreters like myself are restricted from working for them in any capacity, including accepting jobs such as interpreting medical appointments at a doctor's office, interpreting for the police or in hospital ER's, interpreting a class at a local college or university, or at a meeting of the FCC -- because the agency which distributes this kind of work to their employee/freelance interpreters may have two video relay interpreting booths in their office. As the number of these grow, Sorenson not only takes away my ability to work for whom I please, they are also taking away the historically traditional and most imperative employers of interpreters nationwide, the interpreting agencies. I hope that you will consider these points before you take action.

interpreting (full- or part-time) suits them best. The non-compete provision does not guarantee that a former VRS interpreter will provide community interpreting services for the requisite one-year non-compete period. For example, community interpreting may not be suitable for that former VRS interpreter, or community based agencies may be reasonably reluctant to hire a former VRS interpreter. The non-compete provision may, therefore, prevent a former VRS interpreter from any real opportunity to practice his/her professional trade for an entire year. Such a result harms an interpreter with respect to employment opportunities and with respect to his/her ability to maintain the skills necessary for employment. Such a result further harms consumers, deaf and hearing, by restricting the employment and skill development or maintenance opportunities of an otherwise qualified interpreter in a marketplace where demand already outpaces supply.

The geographic scope of the non-compete provision at issue is also vague, overbroad, and unreasonable:

. . . *any state* in the United States, or in any substantially similar political subdivision of any other country, *that Employee helps Employer do business in* while Employee is employed with Employer, for the time period set forth herein, in recognition of the worldwide market for video relay services served by Employer.¹³

VRS is an *interstate* TRS, accepting calls from and placing calls to every state. In effect, a VRS interpreter “helps” a VRS provider “do business” in every state. Sorenson has 60 VRS interpreting centers located in 36 states, plus the District of Columbia and Puerto Rico, with more “opening monthly in various

¹³ *Petition for Declaratory Ruling* at 2 and 46 (Exhibit 3, “Employment Agreement,” Section 4.1) (emphasis added).

regional locations around the nation.”¹⁴ Further, Sorenson’s “Employment Agreement” is by and between a VRS interpreter and Sorenson Communications, Inc.,¹⁵ a business that operates nationwide, not with a particular VRS interpreter center. As such, this non-compete provision means that a former Sorenson VRS interpreter could not be employed by another VRS provider in *any* state.

Sorenson attempts to minimize the geographic scope of its non-compete provision by explaining that it means that a former VRS interpreter “will not work for any other VRS provider within the same state where the interpreter previously worked for Sorenson.”¹⁶ Even narrowly interpreted, this non-compete provision is unreasonable because it prevents a former VRS interpreter from working for another VRS provider located hundreds of miles away within the same state as an existing Sorenson VRS interpreter center and would ultimately require a former VRS interpreter to move entirely to another state to continue working as a VRS interpreter. Sorenson’s attempt to minimize the geographic scope of its non-compete provision fails, too, because it suggests that Sorenson would permit a former VRS interpreter to work for another VRS provider in a different state, even if Sorenson has a VRS interpreter center in that different state. Given the nationwide scope of the business of interstate VRS and of Sorenson

¹⁴ Sorenson Jobs: Position: VRS Interpreter, US: Locations, viewed September 3, 2007 at <http://www.sorensonvrs.com/company/jobs.php>.

¹⁵ *Petition for Declaratory Ruling* at 45 (Exhibit 3, “Employment Agreement”)

¹⁶ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Motion to Dismiss of Sorenson Communications, Inc., CG Docket. No. 03-123 (filed May 29, 2007) (“Motion to Dismiss”) at 2.

Communications, Inc., it is unlikely that this non-compete provision would be interpreted or applied as narrowly as Sorenson suggests.¹⁷

Artificially limiting the pool of qualified interpreters for hire as VRS interpreters harms consumers because it restricts the ability of VRS providers to respond to consumer demand; raises the cost of hiring and training VRS interpreters which, in turn, raises the cost of providing VRS; and reduces the number of interpreters available in the community which, in turn, raises the cost of providing community interpreting.¹⁸

As the Commission has recognized, competition in the TRS market benefits consumers by lowering prices, promoting equipment and service innovation, providing consumers greater choice, and stimulating greater broadband deployment.¹⁹ By artificially limiting the employment options of VRS interpreters,

¹⁷ See also, Comment filed by Nathan Ryan, Docket No. 03-123, August 21, 2007 (emphasis added):

Dear FCC,

I am a sign language interpreter and employee of Sorenson VRS. I have worked for Sorenson for one-and-a-half years. I am concerned that the non-compete agreement I was made to sign is unreasonably restrictive. *I have been told by Sorenson that if I were to move from California (where I live) to Maryland or New York that I my non-compete contract would follow me because Sorenson has centers in those states.* For such a restriction to be levied against me from several thousand miles away is unconscionable. . . .

¹⁸ *Petition for Declaratory Ruling* at 10-16.

¹⁹ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, 37 Comm. Reg. (P&F) 643, CG Docket No. 03-123, FCC 05-203, ¶ 22 (2005) (the Commission noted several benefits from competition in Internet based relay, including potentially lowering the cost of relay service, giving consumers greater choice, bringing “innovation to the provision of VRS and IP relay, both in new equipment and features,” and more broadly stimulating broadband deployment.); see also, *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd. 5442, 5447-48 (2006).

VRS interpreters who would otherwise be available for hire by competitors are kept off or are taken off the market. The dearth of qualified VRS interpreters created by non-compete provisions has a chilling effect on competition in the VRS marketplace.²⁰ Lack of competition harms consumers and interferes with the Commission's statutory mandate to ensure that TRS is available to the extent possible and in the most efficient manner.

3. Conclusion

For the reasons stated above and in the Comments filed by the Consumer Groups, incorporated herein by reference, the NAD urges the Commission to exercise its authority and issue a declaratory ruling that non-compete provisions in VRS interpreter employment contracts, like the one at issue here, are void as a matter of public policy.

Respectfully submitted,

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²⁰ The chilling effect on competition, in the instant case, is magnified by Sorenson's position in the marketplace. Of the 11 VRS providers authorized to draw on the interstate TRS fund, Sorenson is by far the largest, maintaining a market share of approximately 80%. *Petition for Declaratory Ruling* at 6.